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in the

Supreme Court

of the

United States

OCTOBER TERM, 1979

CASE NO. 79-458

BEATRICE R. DONNER,

Appellant,

vs.

PAUL B. ANTON, WILLIAM I. DONNER, RUTH JEAN DONNER, LARNA KATZ DONNER, EDWARD DAVID DONNER,

Appellees.

JURISDICTIONAL STATEMENT

On Appeal From the Supreme Court of Florida

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and
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JURISDICTIONAL STATEMENT

Beatrice Rosalie Donner appeals from a decision of the Supreme Court of Florida. This jurisdictional statement is submitted in accordance with Rule 15 of this Court.

The only reported opinion of the courts below is *In Re Estate of Donner,* 364 So.2d 753 (Fla.3d DCA 1978), *cert.den.*, ____ So.2d ____ (Fla.1979) (A 19-28).

Jurisdiction is based on 28 U.S.C. §1257(2). In the lower courts, Beatrice's attack on the constitutionality of the Florida dower statute under fourteenth amendment equal protection was rejected. Beatrice requests that her appeal be considered a petition for certiorari if the appeal is improvidently taken.

Beatrice seeks review of an order of the Florida Supreme Court refusing to review by certiorari the decision of the Third District Court of Appeal cited above; this order was entered on June 21, 1979. The notice of appeal was filed in the Circuit Court in Dade County, Florida, on September 12, 1979 (A 34).

Jurisdiction is conferred on this Court for the appeal by 28 U.S.C. §1257(2). Jurisdiction is sustained by *Royster Guano Co. v. Virginia,* 235 U.S. 412 (1920); *Reed v. Reed,* 404 U.S. 71 (1971); *Eisenstadt v. Baird,* 405 U.S. 438 (1972); *Orr v. Orr,* ____ U.S. ____; 59 L.Ed.2d 306 (1979); *Caban v. Mohammed,* ____ U.S. ____; 60 L.Ed.2d 297 (1979).

Florida's former dower statute, here challenged, is found in section 731.34 of the Florida Statutes (1971):

731.34 Dower in realty and personalty. — Whenever the widow of any decedent shall not be satisfied with the portion of the estate of her husband to which she is entitled under the law of descent and distribution or under the will of her husband, or both, she may elect in the manner provided by law to take dower, which dower shall be one third in fee simple of the real property which was owned by her husband at the time of his death or which he had before conveyed, whereof she had not relinquished her right of dower as provided by law, and one third part absolutely of the personal property owned by her husband at the time of his death, and in all cases the widow's dower shall be free from liability for all debts of the decedent and all costs, charges, and expenses of administration; . . .[1]

QUESTION PRESENTED

A DOWER STATUTE AWARDING THE VAST BULK OF HIS ESTATE TO DECEDENT'S THIRD WIFE OF 33 DAYS, AT THE EXPENSE OF TWO FORMER WIVES EACH MARRIED TO DECEDENT APPROXIMATELY 14 YEARS AND DEPENDENT FOR SUPPORT UPON CONTRACTS OR JUDGMENTS FOR SUBSTANTIAL PORTIONS OF HIS ESTATE, VIOLATES EQUAL PROTECTION.

[1]The dower statute was repealed in 1974, Chapter 74-106, Laws of Florida, and replaced by an elective share, paid after debts. Fla. Stat. §§733.201-733.212 (1977).

STATEMENT OF THE CASE

Thrice married Samuel Donner died on January 25, 1973. Sam married Beatrice on August 4, 1945. They divorced on April 11, 1959. Their adopted son, Edward, is Sam's only child. A separation agreement provided that if Beatrice survived Sam and did not remarry he would will to her outright, one-third of his net estate, equivalent to a wife's intestate share under 1959 New York law.[2]

At about the time of her divorce, Beatrice suffered from cancer. It is presently in remission. Her health is poor. In the six and one-half years since Sam's death, she has received approximately $150,000 from the estate for her support. She depends exclusively upon this money and has been able to hold a job only sporadically because of her poor health. Money from the estate would have totally stopped last year but for the guarantee of one of the personal representatives that if monthly payments of $1,500 to Beatrice exceeded her entitlement from the estate, the personal representative would repay any overage from his fees.

Ruth Donner married Sam on July 16, 1959. They were divorced October 10, 1972. Ruth has received approximately $450,000 in alimony from the estate. Sam left her a legacy in the amount of one million dollars pursuant to their separation agreement.

[2]Sam omitted Beatrice from his will and she had to enforce her rights under the full faith and credit clause of the United States Constitution. Donner v. Donner, 302 So.2d 452 (Fla.3d DCA 1974), *cert.den.*, 314 So.2d 151, appeal dismissed, 314 So.2d 589 (Fla.1975). Edward David Donner, son of Sam and Beatrice, enforced his right to one-third of the net estate in the same appellate decision.

Larna Donner married Sam on December 22, 1972, 33 days before he died. Larna had her own assets and income at the time of her marriage to Sam, and did not have to depend upon the money from his estate for her existence.

At the time of his death, Sam's gross estate was valued at approximately 7.2 million dollars. The estate will receive at least 1.8 million dollars in income during the course of administration. This nine million dollars will be distributed approximately as follows:

Debts	1.5 million
Administration Expenses	1.5 million
Larna's Dower	3 million
Federal Taxes	1.5-3 million

As can be seen from this brief tabulation, the amount Beatrice receives will depend principally upon the amount of taxes the estate must pay. Whatever is left over after payment of administration expenses, taxes, debts and dower will be shared by Beatrice, Edward and Ruth. All three have been adjudicated to be in the position of legatees of the estate, notwithstanding the fact that both Beatrice and Edward have judgments against the estate. Estate accountants have calculated that Beatrice's one-third of the nine million dollar estate will be approximately $300,000. This one-third is so small because Larna's dower has priority over Beatrice and is deducted as a debt in calculating the amount Beatrice is entitled to. Under the formulas and priorities used by the Florida courts, Larna's one-third of the estate is three million dollars. Its receipt is certain. Half of Beatrice's $300,000 is still in jeopardy. Ruth will receive substantially less than her legacy calls for because of the dower election.

Shortly after Larna elected to take dower under the quoted statute during the probate of Sam's estate, Beatrice objected to the election. In her pleading, Beatrice contended that section 731.34 of the Florida statutes is unconstitutional, *inter alia* under the due process and equal protection clauses of the Fourteenth Amendment of the United States Constitution, to the extent that the statute gives Larna Donner any greater right or benefit in the estate than Beatrice receives (A 1-3). That contention was rejected in the "Order Determining Priorities" entered in the estate proceeding on October 12, 1976. The order determined that Larna's dower portion of the estate had priority over Beatrice's entitlement, and also that dower would be deducted in determining the amount of Beatrice's judgment (A 6-18). Beatrice made the same constitutional argument in her appellate brief in the Third District Court of Appeal. That court rejected the argument, without specifically mentioning it (A 19-28). Again, Beatrice raised the point in her brief in the Supreme Court of Florida. Certiorari was denied without opinion (A 29-33).

ARGUMENT

The Probate Court's "Order Determining Priorities" (A 6-18) necessarily determined that the dower statute was valid, notwithstanding Beatrice's equal protection attack. Under 28 U.S.C. §1257(2) appeal is the proper method of review when validity of a state statute is drawn in question on the ground it is repugnant to the Constitution of the United States, and the decision is in favor of its validity.

It is well established under the decisions of this Court that legislative classifications must be

reasonable, not arbitrary, and "must rest upon some grounds of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Royster Guano Co. v. Virginia,* 253 U.S. 412, 415 (1920); *Reed v. Reed,* 404 U.S. 71, 75-76 (1971); *Eisenstadt v. Baird,* 405 U.S. 438 (1972); *Caban v. Mohammed,* ___ U.S. ___; 60 L.Ed.2d 297 (1979).

At common law and in Florida, the purpose of dower "was to furnish means and sustenance for the wife, and for the nurture and education of the younger children, after the death of the husband and father." *Moore v. Price,* 123 So. 768, 772 (Fla.1929). When Sam died, Beatrice and Ruth both were dependent upon him for their support. Both received alimony. Beatrice's stopped when Sam died. Ruth's continued. Both were promised by contract or judgment that substantial sums of money would be left by will. Shortly, Beatrice's sustenance will be eliminated by the dower awarded to Larna under the challenged statute.

The dower statute arbitrarily picked Larna from among the "class" of Sam's wives, and favored her with the vast bulk of his distributable estate. This discriminatory choice has no relation to the object of the legislation. It cannot be said to be the purpose of dower to permit a wife of 33 days to live in great luxury while the first wife and the decedent's only child, with judgments for their support, starve.[3] The application of the

[3]Compare the approach taken by the Federal Social Security laws. Benefits are provided to a widow, defined *inter alia,* as a surviving wife married to the decedent for not less than nine months immediately prior to death, and to a divorced wife, who had been married to the decedent for ten years prior to divorce. 42 U.S.C.A. §§402, 416.

dower statute in this case is totally inconsistent with its purpose because the widow's advantage is not gained over only a group of general creditors, but at the expense of two former wives and a son of the decedent — all of whom are more entitled to the protection of the state than is this widow.

In recent years, this Court has not hesitated to scrutinize statutes affecting domestic relationships in an equal protection context.[4] In *Orr v. Orr,* ___ U.S. ___; 59 L.Ed.2d 306 (1979), this Court invalidated Alabama's alimony statute because it denied alimony to men. The Court agreed "that assisting needy spouses is a legitimate and important governmental objective", but required a determination whether the classification at issue is substantially related to achievement of those objectives. It was not. Nor can it be said that Florida's dower statute, in singling out the last among several wives for special benefit at the expense of the others, creates a classification substantially related to achievement of the objective of the statute. See also the dissenting opinion of Justices Brennan and Marshall in *Kahn v. Shevin,* 416 U.S. 351, 360 (1974) which criticizes the Florida widow's property tax exemption statute because its benefit is provided equally to a financially independent heiress as well as an unemployed widow with dependent children.

[4]Caban, *supra;* Stanley v. Illinois, 405 U.S. 645 (1972); Stanton v. Stanton, 421 U.S. 7 (1975).

CONCLUSION

For the reasons stated, this Court should find that it has probable jurisdiction and give plenary consideration to the dower statute's clear violation of equal protection of law.

Respectfully submitted,

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Appendix

IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT IN AND
FOR DADE COUNTY, FLORIDA.

PROBATE DIVISION

Case No. 73-2814 (Dowling)

IN RE:

ESTATE OF SAMUEL DONNER,
Deceased.

OBJECTION TO ELECTION TO TAKE DOWER, DEMAND FOR JURY TRIAL, AND REQUEST FOR EQUITABLE APPORTIONMENT

BEATRICE ROSALIE DONNER, the first wife of the decedent and holder of a judgment entitling her to one-third (1/3) of his net estate, objects to the election to take dower filed herein by wife three, LARNA KATZ DONNER, on the following grounds, and Beatrice Doner requests the relief outlined herein:

1. Larna Katz Donner had actual knowledge, or she should have known of the agreement (and judgments) between Samuel Donner and Beatrice Rosalie Donner which required Samuel to leave to Beatrice one-third (1/3) of his net estate and to their son, Edward David Donner, one-third (1/3) of his net estate. Notwithstanding this knowledge, Larna Donner conspired with and assisted Samuel in omitting Beatrice entirely from his will and eliminating most of what

Samuel agreed to leave to his son, Edward. Because of her actions, Larna Katz Donner should be barred completely from any dower in this estate.

2. Pursuant to Section 733.12(3) of the Florida Statutes, Beatrice demands trial by jury on Larna's right of dower.

3. In the event it is found that Larna is entitled to dower, Beatrice requests the further and additional relief:

(a) That this Court declare and establish her lien on one-third (1/3) of the net estate pursuant to the Alabama judgment divorcing Samuel and Beatrice, the Florida judgment which domesticated the Alabama judgment, and the Separation Agreement incorporated therein by reference, and that said one-third (1/3) of the net estate subject to the lien of Beatrice be eliminated from the portion of the estate from which dower is assigned, pursuant to Section 731.34 of the Florida Statutes.

(b) That this Court declare Section 731.34 of the Florida Statutes unconstitutional to the extent that said statute would purport to give Larna Katz Donner any greater right or benefit in the estate of Samuel Donner than that which Beatrice is ultimately to receive. If Larna receives more from this estate than does Beatrice under Section 731.34, the statute would be violative of Article I, Sections 2, 9 and 10 of the Florida Constitution, and Article I, Section 10 and the due process and equal

protection clauses of Amendment XIV of the United States Constitution. *In re Estate of Humphreys,* 299 So.2d 595, 598 (Fla. 1974) (dissenting opinion).

(c) That any dower which said Larna Katz Donner might be awarded should in equity be reduced to such amount as it would have been had she and Samuel Donner entered into an antenuptial agreement embodying the provision which Samuel Donner agreed in his property settlement with Ruth Jean Donner that he would require of another prospective wife. To permit otherwise would work to the detriment of Beatrice Donner in the collection of her judgment against the Estate of Samuel Donner.

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to all attorneys listed on the attached sheet this 12th day of February 1975.

SINCLAIR, LOUIS & SIEGEL
Attorneys for Beatrice R. Donner
1600 Alfred I. DuPont Building
Miami, Florida 33131

BY_____
PAUL SIEGEL

IN THE CIRCUIT COURT OF THE
11TH JUDICIAL CIRCUIT, IN AND
FOR DADE COUNTY, FLORIDA.

PROBATE DIVISION

Case No. 73-2814 (Judge Dowling)

IN RE: The Estate of
SAMUEL DONNER,
Deceased.

SUPPLEMENT TO OBJECTION OF BEATRICE R. DONNER TO ELECTION OF LARNA KATZ DONNER TO TAKE DOWER

BEATRICE R. DONNER herewith files her Supplement to Objection to Election of Larna Katz Donner to Take Dower to add thereto an additional paragraph numbered and stated as follows:

"4. Larna Katz Donner interfered with the contractual relations existing between BEATRICE R. DONNER and Edward David Donner and the deceased by reason of the provisions to be made for BEATRICE R. DONNER and Edward David Donner incorporated in the Separation Agreement between BEATRICE R. DONNER and the deceased, the Alabama judgment divorcing the parties and the Florida judgment domesticating the said Alabama judgment.

WE HEREBY CERTIFY that the foregoing was mailed to all attorneys on the list attached hereto, this 23rd day of December, 1975.

SINCLAIR, LOUIS & SIEGEL
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1600 A. I. duPont Building
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BY P.A.L

IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT, IN AND
FOR DADE COUNTY, FLORIDA

PROBATE DIVISION

CASE NO. 73-2814

Judge Frank B. Dowling (Div. 32)

IN RE: ESTATE OF
SAMUEL DONNER,
Deceased.

ORDER DETERMINING PRIORITIES

THIS CAUSE came on to be heard before the Court upon petition for the entry of an Order determining the priority of conflicting claims made by the principal beneficiaries of this estate. The contesting parties and their respective relationship to the decedent, SAMUEL DONNER, and the nature of their claim may be briefly stated as follows:

(1) *LARNA KATZ DONNER,* Surviving Spouse:

LARNA KATZ DONNER was lawfully married to the decedent on or about December 22, 1972 in the State of Florida. SAMUEL DONNER died on January 25, 1973. She has elected against the Last Will and Testament of the decedent and claims the right of dower conferred upon her by the

laws of the State of Florida in effect at the time of the decedent's death. LARNA KATZ DONNER claims that her right of dower is paramount and superior in priority to the claims of the other contesting parties.

(2) *RUTH JEAN DONNER,* the Second Wife of the decedent, who was divorced from him on October 10, 1972 by Decree entered in the Circuit Court, Dade County, Florida:

RUTH JEAN DONNER claims by virtue of a Separation Agreement entered into between her and the decedent on August 4, 1972 wherein the decedent agreed as follows:

> "8. *Will Provision.* The Husband shall, as part of the settlement, promptly make, execute, and keep in effect until his death, a will under which the Husband shall devise and bequeath unto his Wife, if living, the sum of ONE MILLION ($1,000,000.00) DOLLARS, free of all estate and inheritance taxes. Such bequest shall be payable regardless of whether or not the wife shall have remarried prior to the death of the Husband. In the event the Husband, shall remarry, the Husband agrees that he will, prior to any such marriage, enter into an antenuptial agreement whereby his intended wife will relinquish any claim of dower or right of inheritance which would, but for such antenuptial agreement, diminish the sum to be received by the present wife under the provisions of this paragraph."

The decedent performed his obligation in the Settlement Agreement to the extent that he did make a bequest in his Last Will to RUTH JEAN DONNER in the sum of ONE MILLION ($1,000,000.00) DOLLARS, free of all estate and inheritance taxes. He violated his Settlement Agreement with her in that he executed an Antenuptial Agreement with his surviving spouse, LARNA, wherein he failed to incorporate the provision that would protect RUTH JEAN DONNER's bequest in the event his wife to be, LARNA, elected to take dower in his estate. RUTH JEAN DONNER claims priority to the dower rights of LARNA KATZ DONNER to the extent that any deficiency in her bequest of ONE MILLION DOLLARS, tax free, shall result by virtue of LARNA KATZ DONNER's election to take dower and that such deficiency should be charged and subrogated against the right of LARNA KATZ DONNER to receive dower in her husband's estate.

(3) *BEATRICE R. DONNER,* the First Wife of the decedent:

BEATRICE R. DONNER and SAMUEL DONNER were divorced on April 11, 1959. They had been husband and wife since August 4, 1945 and during the course of their marriage had adopted a son, EDWARD DAVID DONNER. Prior to the divorce of BEATRICE and SAMUEL, they entered into a Separation Agreement on March 2, 1959 wherein it was provided among other things in Paragraph A (5) as follows:

> "(5) The Husband agrees that if the Wife shall survive him and shall not have remarried during his lifetime, he will, by his Last Will and Testament, devise and bequeath to the Wife, outright, one-third (⅓) of his net estate (which is the equivalent of an intestate share of a wife in accordance with the laws of the State of New York presently in force and effect.)."

SAMUEL DONNER failed to provide for BEATRICE R. DONNER in his Last Will and Testament.

Upon the death of SAMUEL DONNER, BEATRICE R. DONNER filed her claim against the decedent's estate seeking enforcement of the provisions of the Separation Agreement above quoted. Objection to her claim having been filed, she instituted a Complaint for specific performance of the Separation Agreement in General Jurisdiction Division of the Circuit Court of Dade County, Florida, in Case No. 73-5012. In that case a Summary Judgment was entered providing as follows:

> "2. Plaintiff Beatrice Rosalie Donner be and is hereby declared entitled to, and shall recover of and from Charles N. Donner and William I. Donner, or their successors, as Executors of the Estate of Samuel Donner, deceased, Case No. 73-2814, Probate Division of this Court '. . . outright, one-third (⅓) of his net estate (which is the equivalent of an intestate share of a wife in accordance with the laws of the State of New York) . . .' in effect March 2, 1959 in accordance with the terms and provision of the final Divorce Decree entered on the 10th day of April 1959

by the Circuit Court of Marion County, State of Alabama in Case No. 7605 entitled: Beatrice Rosalie Donner vs. Samuel Donner."

This Summary Judgment was appealed and affirmed. Opinion reported *Donner v. Donner,* 305 So.2d 452 (Fla. App. 3d 1974), cert. den., 314 So.2d 151. BEATRICE R. DONNER claims that her Final Judgment affirmed on appeal places her in a position of judgment creditor against the estate of the deceased and that her right to one-third of the net distributable estate of the decedent as provided in said Judgment is paramount and superior to the claims of all other interested parties in this proceeding.

(4) *EDWARD DAVID DONNER,* the adopted son of SAMUEL DONNER and BEATRICE R. DONNER:

EDWARD DAVID DONNER claims under a provision contained in the Separation Agreement between BEATRICE R. DONNER and SAMUEL DONNER under date of March 2, 1959 wherein it was provided as follows:

"The Husband agrees that, if his son shall survive him, he will, by his Last Will and Testament, irrevocably devise and bequeath to his said son one-third (⅓) of his net estate, both real and personal, unless other children shall hereafter be born to or adopted by the Husband, in which event the Husband will irrevocably devise and bequeath to

said son of the parties hereto a share of his net estate, both real and personal, equal to one-third (⅓) thereof divided by the total number of the Husband's children (including his said son), him surviving."

By his Last Will and Testament SAMUEL DONNER failed to provide for his son, EDWARD DAVID DONNER, in accordance with the provisions in his behalf above quoted. No other children were born to or adopted by SAMUEL DONNER. EDWARD DAVID DONNER was made a party defendant in the cause of action filed by BEATRICE R. DONNER for the enforcement of her claim against the decedent's estate and he, in that cause, filed a cross-complaint for relief and specific performance of the provisions of the Separation Agreement made in his behalf. The Summary Judgment entered in that cause was entered in favor of EDWARD DAVID DONNER in the following language:

"4. Defendant cross-plaintiff Edward David Donner be and is hereby declared entitled to, and shall recover of and from Charles N. Donner and William I. Donner, or their successors, as Executors of the Estate of Samuel Donner, deceased, Case No. 73-2814, Probate Division of this Court '. . . one-third (⅓) of his net estate both real and personal . . .' in accordance with the terms and provisions of the final Divorce Decree entered on the 10th day of April 1959 by the Circuit Court of Marion County, State of

Alabama in Case No. 7605, entitled: Beatrice Rosalie Donner vs. Samuel Donner."

On appeal as above mentioned, this Summary Judgment was affirmed. EDWARD DAVID DONNER now claims as a judgment creditor against the estate of SAMUEL DONNER, deceased, and asserts priority of his claim above all other claimants other than BEATRICE R. DONNER.

THE RIGHTS OF THE CLAIMANTS WILL BE DISCUSSED IN THE ORDER ABOVE SET FORTH.

1. *LARNA KATZ DONNER* was lawfully married to the decedent and is his surviving spouse. As such, she is entitled to her full right of dower conferred upon her by the laws of the State of Florida. Much has been said about the short duration of her marriage which, as above noted, lasted just over one month in period of time. The right to dower is not determined by the length of the marriage but is determined by virtue of the marital relationship itself. LARNA KATZ DONNER cannot be penalized by virtue of the short term of her marriage as she certainly had no possible knowledge at the time of the marriage whether SAMUEL DONNER would live 30 days or 15 years. She having timely elected to take against the Last Will and Testament of the decedent and to claim her dower rights under the laws of the State of Florida, she is entitled to do so and Judgment for Dower will be entered in her favor and Commissioners appointed to set off and allot the same. The finding of this Court, in the case of RUTH JEAN DONNER, Plaintiff, vs. PAUL B. ANTON and others, including LARNA KATZ DONNER, in the Circuit

Court of Dade County, General Jurisdiction Case No. 74-1716, wherein RUTH JEAN DONNER, by Final Judgment, was declared to be entitled to an equitable lien upon, and to be equitably subrogated to, the dower awarded to LARNA KATZ DONNER in the Estate of SAMUEL DONNER, deceased, as in said Judgment provided, does not diminish the award to LARNA KATZ DONNER of her full dower rights in the decedent's estate which rights are prior and paramount to the rights of all other contesting parties, subject only to the lien and subrogation above noted.

2. *RUTH JEAN DONNER,* by Final Judgment entered in *Donner vs. Anton,* Case No. 74-1716 above noted, has been declared to be a judgment creditor of the Estate of SAMUEL DONNER, deceased, to the extent and in the amounts in said Final Judgment noted and in that respect is entitled to the priority awarded general creditors of the estate of the decedent. To the extent that the Final Judgment entered in that cause against the Estate of SAMUEL DONNER, deceased, is not satisfied against general assets of the Estate of SAMUEL DONNER, deceased, after the award of Dower to LARNA KATZ DONNER has been fully set aside, RUTH JEAN DONNER is entitled to and has priority of satisfaction of her bequest of ONE MILLION DOLLARS, tax free, from the dower of LARNA KATZ DONNER so set aside in her behalf. RUTH JEAN DONNER has no priority over the claims of BEATRICE R. DONNER and EDWARD DAVID DONNER hereinafter set forth.

3. *BEATRICE R. DONNER.* The sole and only right of BEATRICE R. DONNER to claim against the estate of SAMUEL DONNER, deceased, is founded

upon the Separation Agreement she entered into with the decedent on March 2, 1959. She is not named as a legatee or beneficiary in the decedent's Last Will and Testament and, therefore, cannot take any part of his estate under and by virtue of the terms of the Will. She is entitled to exactly what her Separation Agreement provided for in her behalf, no more and no less. The Separation Agreement provided that the decedent would by his Last Will and Testament devise to BEATRICE R. DONNER outright one-third of his net estate which is the equivalent of an intestate share of a wife in accordance with the laws of the State of New York then in force and effect. Actually this provision for BEATRICE did not assure or guarantee that she would receive anything from his estate even if he had incorporated such a provision in his Last Will and Testament. MR. DONNER could have died without sufficient assets to have a net estate. By the terms of the Agreement, she was to receive only one-third (⅓) of his net distributable estate and that is exactly what she is entitled to.

There has been considerable discussion and evidence with respect to whether BEATRICE R. DONNER would be a creditor or a legatee of SAMUEL DONNER's estate under the law of the State of New York. There is ample authority in New York law that she would take of his estate to the same extent as if she were a legatee as provided in the Separation Agreement. It makes no difference whether she is labeled a creditor or legatee. She derives her right under the contract and not under the Will, and her cause of action is for breach of that contract or agreement and her relief by way of damages is measured by that which she would have received had the Agreement been compiled with. See

Landers v. Sherwin, 261 So.2d 542, 543 (Fla. App. 4th 1972) where the Court said:

> "Appellee's father clearly breached his agreement, and without question, appellee as a third party beneficiary had a cause of action for her damages. Had she elected to file such a suit (which she did not) she would have been in the category of a general creditor of the estate as to whom F.S. Section 733.16, F.S.A. would be applicable. Cooey v. Cooey, 1938, 132 Fla. 716, 182 So. 202. Apparently in hopes of avoiding the effect of her noncompliance with F.S. Section 733.16, F.S.A., appellee elected as her remedy to have a court of equity impose a constructive trust for her benefit upon the property which, according to the terms of the agreement, was to be devised by Will."

This rule of law applied by the Appellate Court of this state applies equally to RUTH JEAN DONNER and to EDWARD DAVID DONNER with respect to their claims.

The Summary Judgment in behalf of BEATRICE R. DONNER entered in Case No. 73-5012 above quoted which was affirmed upon appeal determined the validity of the Separation Agreement in so far as it was a contract to make a Will and the Summary Judgment there entered constitued a money judgment against the Estate of SAMUEL DONNER, deceased, the dollar amount of which is to be determined by fixing the sum which will constitute one-third (1/3) of the net distributable estate of the decedent in accordance with the laws of the State of New York at the time the Agreement

was executed. To the extent of that dollar amount, BEATRICE R. DONNER is a judgment creditor of the Estate of SAMUEL DONNER, deceased.

The Court has heard extensive testimony from highly regarded New York attorneys having expertise in this area of the law who have testified that under the law of the State of New York at the time referred to, one-third (1/3) of the net distributable estate of the decedent was the gross estate, less the debts of the decedent, less the cost of administration, less funeral expenses, and less that amount that would be award to a surviving spouse of the decedent, but not estate or inheritance taxes. Applying that formula to the gross estate of SAMUEL DONNER, deceased, one-third of that remaining after the deductions aforesaid is the dollar amount of the judgment in behalf of BEATRICE R. DONNER that she is entitled to as a judgment creditor of the estate. To the extent of her judgment she has no priority over the judgment creditor status of RUTH JEAN DONNER or the judgment creditor status of EDWARD DAVID DONNER. BEATRICE R. DONNER has no priority over the dower rights of LARNA KATZ DONNER.

4. *EDWARD DAVID DONNER.* The claim of EDWARD DAVID DONNER against the estate of the decedent is also to be determined by the obligations of the decedent as expressed in the Separation Agreement of March 2, 1959. As has been above noted, SAMUEL DONNER, by his Agreement, was obligated to bequeath to his son one-third of his net estate. The agreement further provided that the decedent (husband) reserved the right to devise and bequeath this share of his estate in whole or in part to trustees designated by

the husband. SAMUEL DONNER did not bequeath one-third of his net estate to his son by his Last Will and Testament but he did bequeath $200,000.00 to trustees for the benefit of EDWARD DAVID DONNER as in said Will set forth. To that extent he honored and complied with his obligation to his son as contained in the Separation Agreement.

EDWARD DAVID DONNER is entitled to exactly that benefit that the Separation Agreement between husband and wife conferred upon him as the son, no more and no less: one-third of the net estate of SAMUEL DONNER, deceased, to be determined as the gross estate, less the debts of the decedent, less the cost of administration, less funeral expenses, less estate or inheritance taxes and less the dower or elective share of the surviving spouse of the decedent. In the Summary Judgement, Case No. 73-5012, EDWARD DAVID DONNER was awarded a money judgment against the estate of the decedent to the extent of one-third of his net estate, both real and personal. The dollar amount of that judgment is to be determined by the formula above stated and to that extent EDWARD DAVID DONNER is a judgment creditor of the estate of the decedent. In the event that the trust in the sum of $200,000.00 provided for the son, EDWARD DAVID DONNER, in the Last Will and Testament should be funded, then said sum would be credited against the money judgment aforesaid towards the satisfaction thereof. EDWARD DAVID DONNER has no priority over the claim of LARNA KATZ DONNER for dower. He stands on equal footing with RUTH JEAN DONNER and BEATRICE R. DONNER as judgment creditors of the Estate of SAMUEL DONNER, deceased.

The premises considered, it is now:

ORDERED AND ADJUDGED that the priorities in this cause as between the parties aforesaid be and the same is hereby determined to be as follows:

1. The dower rights of LARNA KATZ DONNER is of first priority.

2. The rights of RUTH JEAN DONNER, BEATRICE R. DONNER, and EDWARD DAVID DONNER as judgment creditors of the Estate of SAMUEL DONNER, deceased, are of equal priority.

DONE AND ORDERED in Chambers at Miami, Dade County, Florida, this 12th day of October, 1976.

/s/ Frank B. Dowling
CIRCUIT JUDGE

Copies furnished to:

Heller & Kaplan, Esqs.
Lewis Horwitz, Esq., of Broad & Cassel, Esqs.
Joseph E. Price, Esq., Abrams, Anton, Robbins, Resnick & Schneider, P.A.
Amy Linda Steele, Esq.
Paul Louis, Esq., Sinclair, Louis & Siegel, Esqs.
Phillip Schiff, Esq., Dubbin, Schiff, Berman & Dubbin, Esqs.

In re ESTATE of Samuel DONNER,
Deceased.

Edward David DONNER, Larna Katz Donner, Beatrice Donner, and Ruth Jean Donner,
Appellants,

v.

Paul B. ANTON et al.,
Appellees.

Nos. 76-2091, 76-2092, 76-2106 and 76-2232.

District Court of Appeal of Florida,
Third District.

Oct. 3, 1978.

Rehearing Denied Nov. 22, 1978.

In a probate proceeding, the Circuit Court for Dade County, Frank B. Dowling, J., entered order determining nature and priority of dower and other claims filed against estate, and surviving spouse and other claimants appealed. The District Court of Appeal, Hubbard, J., held that: (1) no equitable lien or encumbrance of any kind could be imposed upon surviving spouse's dower, which was prior and paramount to claims of all contesting parties; (2) former wife was judgment creditor against estate for amount in which testator was in arrearage at time of his death on alimony and other payments due prior divorce decree; (3) former wife was

legatee of estate on $1,000,000 legacy bequeathed her under will, and (4) testator's first wife and adopted son had to be treated just as if testator had made legacies to them in his will that he had previously contracted that he would.

Affirmed in part and reversed in part.

1. Dower and Curtesy — 23

Surviving wife's dower was prior and paramount to claims against testator's estate, was unencumbered by any equitable lien in favor of testator's second wife, and had to be satisfied prior to satisfying any legatee or judgment creditor.

2. Dower and Curtesy — 23

Executors and Administrators — 219.7(1), 261

Testator's second wife was judgment creditor against estate for amount in which testator was in arrearage at time of his death on alimony and other payments due under prior divorce decree, subordinate only to surviving wife's right of dower.

3. Executors and Administrators — 261

As to her million dollar legacy under testator's will, testator's second wife was legatee of estate and took after surviving wife's dower but on equal basis with testator's first wife and adopted son, whose claims against estate were based on divorce settlement agreement in which testator contracted to will them certain

portions of estate, an agreement that he breached by failing to so provide in his last will and codicil.

4. Executors and Administrators — 261

Testator's first wife and son, whose claims against estate were based on divorce settlement agreement in which testator contracted to will them certain portions of his estate, an agreement that he breached by failing to so provide in his last will and codicil, and whose claims had previously been adjudicated valid and enforceable against estate, had to be treated the same as legatees of estate, and thus their claims had equal priority with other legacies but were subordinate to surviving wife's dower and second wife's claim for arrearages under divorce decree.

5. Judgment — 585(3)

Previous case which found that claims of testator's first wife and adopted son were valid and enforceable against estate decided validity, not priority, of their claims against estate and thus was not res judicata as to priority of such claims.

Dubbin, Schiff, Berkman & Dubbin, Miami, Broad & Cassel and Lewis I. Horwitz, Bay Harbor Island, Sinclair, Louis, Siegel & Heath, Heller & Kaplan, Miami, Amy Linda Steele, North Miami Beach, for appellants.

Abrams, Anton, Robbins, Resnick, Schneider & Mager and David L. Kline, Hollywood, Kelly, Black, Black & Kenny, Miami, for appellees.

Before HAVERFIELD, C. J., and HUBBART and KEHOE, JJ.

HUBBART, Judge.

This is a probate proceeding in which the trial court, after a full hearing, entered an order determining the nature and priority of dower and other claims filed against a decedent's estate in the Circuit Court for the Eleventh Judicial Circuit of Florida. The decedent's surviving spouse and the other claimants appeal.

A preliminary factual background for this case appears in our companion decision of *Donner v. Anton,* 364 So.2d 742 (Fla.3d DCA 1978) ("Donner I") (case nos. 76-1919, 76-2233; opinion filed Oct. 3, 1978). Additional relevant facts follow.

There are four principal claimants against the estate of the decedent Samuel Donner: Larna Donner, Ruth Donner, Beatrice Donner, and Edward Donner — all of whom are involved in this appeal. (1) Larna Donner [decedent's surviving spouse and third wife] has perfected a valid dower claim against the estate herein by electing to take dower against the decedent's last will and codicil pursuant to Section 731.35, Florida Statutes (1971), which was then in effect at the time of the decedent's death.

(2) Ruth Donner [decedent's second wife] has valid claim against the estate for $452,210.74 which represents the amount due and owing by the decedent at his death to Ruth for lump sum alimony arrearages and other bills which the decedent was required to pay under a prior divorce decree involving the decedent and Ruth

Donner. In addition, Ruth Donner claims an equitable lien on Larna Donner's dower to satisfy, if necessary, Ruth's one million dollar legacy under the decedent's last will due to an alleged fraud committed by Larna and the decedent in breaching a certain property settlement agreement between the decedent and Ruth Donner, as more fully discussed in *Donner v. Anton,* 364 So.2d 742 (Fla.3d DCA 1978) ("Donner I").

(3) Beatrice Donner [decedent's first wife] and (4) Edward Donner [decedent's adopted son] have valid claims against the estate herein for one third each of the decedent's net estate. These claims are based on a March 2, 1959, divorce settlement agreement later incorporated into a divorce decree involving the decedent and Beatrice Donner in which the decedent contracted to will Beatrice and Edward Donner the above portions of his estate, an agreement which he breached by failing to so provide in his last will and codicil. By separate suit previously instituted for specific performance on the above contract to make a will, these claims have been adjudicated valid and enforceable against the estate. *Donner v. Donner,* 302 So.2d 452 (Fla.3d DCA 1974), cert. denied 314 So.2d 151 (Fla.), appeal dismissed 314 So.2d 589 (Fla.1975).

After a full hearing, the trial court entered an order concluding that Larna Donner's dower rights were prior and paramount to all other claims subject only to an equitable lien in favor of Ruth Donner to satisfy, if necessary, Ruth's one million dollar legacy under the decedent's will. All other claimants were held to be judgment creditors of the estate of equal priority. Beatrice and Edward Donner's claims were determined to be one third of the net distributable estate.

I

We are first met with Larna Donner's contention that the trial court erred in its order on priorities in imposing an equitable lien upon her dower in favor of Ruth Donner. This is the same contention which was made in our companion decision of *Donner v. Anton,* 364 So.2d 742 (Fla.3d DCA 1978) ("Donner I"). In that case we held that this contention had merit and struck the equitable lien on Larna Donner's dower. For the reasons expressed in that decision, that portion of the order determining priorities herein which imposes an equitable lien upon Larna Donner's dower is also stricken. We hold that no equitable lien or encumbrance of any kind can be imposed upon the surviving spouse's dower under the facts of this case.

II

We now come to the central issue on this appeal, namely, the priority of the contesting parties' claims against the decedent's estate. Ruth, Beatrice and Edward Donner contend for differing reasons that the trial court erred in its order on priorities by treating them all as judgment creditors of equal priority against the estate behind Larna Donner's dower claim. On this aspect of the case, Larna Donner and the estate's personal representative, Paul B. Anton, urge that the trial court committed no error.

Ruth Donner contends that she is a judgment creditor against the estate and that her claims herein should come ahead of Beatrice and Edward Donner on the ground that the latter occupy the same position as legatees of the estate; she also urges that her claim is

prior to Larna Donner's dower. Beatrice and Edward Donner jointly contend that they are judgment creditors of the estate with priority over Larna Donner's dower and Ruth Donner's claims on the authority of *Donner v. Donner,* 302 So.2d 452 (Fla.3d DCA 1974), supra.

We hold that (1) Larna Donner's dower is prior and paramount to the claims of all the contesting parties on this appeal, which dower is unencumbered by any equitable lien in favor of Ruth Donner; (2) Ruth Donner is a judgment creditor against the estate in the amount of $452,210.74 which represents the amount the decedent was in arrearage at the time of his death on alimony and other payments due under the prior divorce decree involving the decedent and Ruth Donner; this claim comes after Ruth Donner's dower but prior to Beatrice and Edward Donner's claims; (3) Ruth Donner is a legatee of the estate on the one million dollar legacy bequeathed to her under the decedent's will; this claim comes after Larna Donner's dower and Ruth Donner's $452,210.74 claim but is of equal priority with Beatrice and Edward Donner's claims; (4) Beatrice and Edward Donner must be treated the same as legatees of the estate just as if the decedent had made the legacies to them in his will as he had previously contracted that he would; these claims come after Larna Donner's dower and Ruth Donner's $452,210.74 claim but are of equal priority with Ruth Donner's one million dollar legacy. The trial court's order on priorities on this aspect of the case is therefore affirmed in part and reversed in part as indicated above.

A

[1] For reasons more fully developed in our companion decision of *Donner v. Anton,* 364 So.2d 742 (Fla.3d DCA 1978) ("Donner I"), it is clear that Larna Donner's dower is prior and paramount to the claims of all the contesting parties on this appeal. Her dower is unencumbered by any equitable lien in favor of Ruth Donner and must come prior to satisfying any of the legatees or judgment creditors in this cause. *Henderson v. Usher,* 125 Fla. 709, 170 So. 846 (1936); *Goodwin v. King,* 31 Fla. 525, 13 So. 108 (1893)..

B

[2] Ruth Donner is clearly a judgment creditor against the decedent's estate in the amount of $452,210.74 because this represents the amount the decedent was in arrearage at the time of his death on alimony and other payments due under the prior divorce decree involving the decedent and Ruth Donner. Indeed, no party on this appeal seriously contests Ruth Donner's claim on this score. The trail court was accordingly correct in treating Ruth Donner as a judgment creditor of the estate as to the above-stated sum of money subordinate to Larna Donner's dower.

[3] By our companion decision in *Donner v. Anton,* 364 So.2d 742 (Fla.3d DCA 1978) ("Donner I"), Ruth Donner has no equitable lien against Larna Donner's dower to satisfy Ruth Donner's one million dollar legacy under the decedent's will. As to this legacy, absent the above equitable lien, Ruth Donner is clearly a legatee of the estate and must take after Larna Donner's dower but on an equal basis with Beatrice and Edward

Donner's claims. The trial court accordingly erred in treating Ruth Donner's legacy as a judgment claim against the estate.

C

[4] Beatrice and Edward Donner must be treated the same as legatees of the estate just as if the decedent made the legacies to them in his will as he had previously contracted to do in the 1959 separation agreement with Beatrice Donner. Surely, these two should not stand in a better position as creditors of the estate when, as here, the decedent failed to do that which he contracted to do. He contracted to make them legatees of the estate and when he failed to do so, both Beatrice and Edward Donner sued for specific performance on the contract. They prevailed in their suit; the judgment was affirmed on appeal. They are accordingly entitled to specific performance on the contract to make a will which in effect puts them in the same category as legatees of the estate. *Erwin v. Mark,* 105 Mont. 361, 73 P.2d 537 (1937); *In re Hoyt's Estate,* 174 Misc. 512, 21 N.Y.S.2d 107 (Sur.Ct.1940). As such, their claims must be treated as having equal priority with the one million dollar legacy of Ruth Donner, but of subordinate priority to Larna Donner's dower and Ruth Donner's $452,210.74 claim. The trial court therefore erred in treating the subject claims as judgment claims against the decedent's estate.

[5] We are unpersuaded by Beatrice and Edward Donner's contention that this court's decision in *Donner v. Donner,* 302 So.2d 452 (Fla.3d DCA 1974), supra, is res judicata in their favor on the priorities issues now before this court. That issue was in no way involved in

the prior *Donner* case and this court's opinion therein neither decided the issue nor intimated any views thereon. The case decided the validity, not the priority, of Beatrice and Edward Donner's claims against the decedent's estate herein.

III

We have carefully examined the remaining contentions of the appellants herein as against the record and the applicable law and find them to be without merit. We have particularly examined Beatrice Donner's contention that the trial court improperly computed her valid claim of a one third share in the decedent's net estate. Her cited authorities, however, do not convince us that any error was committed by the trial court on this aspect of the case.

The order appealed from is affirmed in part and reversed in part; the cause is remanded for further proceedings consistent with the holdings of this court as indicated above.

IN THE SUPREME COURT OF FLORIDA

THURSDAY, JUNE 21, 1979

CONSOLIDATED CASES

CASE NO. 55,781

District Court of Appeal, Third District
76-2091, 76-2092, 76-2106, 76-2232

In Re: Estate of SAMUEL DONNER

RUTH JEAN DONNER,
Petitioner,

v.

PAUL P. ANTON, et al.,
Respondents.

CASE NO. 55,782

District Court of Appeal, Third District
78-60

In Re: Estate of SAMUEL DONNER

EDWARD DAVID DONNER,
Petitioner,

v.

PAUL B. ANTON, etc.,
Respondent.

CASE NO. 55,783

District Court of Appeal, Third District
76-2091, 76-2092, 76-2106, 76-2232

In Re: Estate of SAMUEL DONNER

EDWARD DAVID DONNER,
Petitioner,

v.

PAUL ANTON, et al.,
Respondents.

CASE NO. 55,784

District Court of Appeal, Third District
76-2091, 76-2092, 76-2106, 76-2232

In Re: Estate of SAMUEL DONNER

BEATRICE ROSALIE DONNER,
Petitioner,

v.

PAUL B. ANTON, et al.,
Respondents.

CASE NO. 55,785

District Court of Appeal, Third District
76-1919, 76-2233

In Re: Estate of SAMUEL DONNER

RUTH JEAN DONNER,
Petitioner,

v.

LARNA KATZ DONNER, et al.,
Respondents.

These causes having heretofore been submitted to the Court of jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under

Fla. R. App. P. 9.120, and it appearing to the Court that it is without jurisdiction, it is ordered that certiorari is denied.

No Motion for Rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d).

BOYD, Acting C.J., OVERTON, SUNDBERG, HATCHETT and ALDERMAN, JJ., concur

In Re: Estate of SAMUEL DONNER
Case Nos. 55,781 — 55, ____

A True Copy
TEST:

Sid J. White
Clerk, Supreme Court

By: Dublin Causseay
Deputy Clerk

TC
cc: Hon. Louis J. Spallone, Clerk
Hon. Frank B. Dowling, Judge
Hon. Richard P. Brinker, Clerk
Robert Golden, Esquire
Daniel Neal Heller
Paul B. Anton, Esquire
Lewis Horwitz, Esquire
Amy Linda Steele, Esquire
Philip Schiff, Esquire
Paul Louis, Esquire
Paul Siegel, Esquire
Vassar B. Carlson, Esquire

Bertha Claire Lee, Esquire
Kelly, Black, Black & Kenny
Mershon, Sawyer, Johnston, Dunwody & Cole
Meyer, Weiss, Rose & Arkin
Cushman & Cushman
Colson & Hicks

IN THE CIRCUIT COURT OF
THE ELEVENTH JUDICIAL CIRCUIT
IN AND FOR DADE COUNTY, FLORIDA.

PROBATE DIVISION

Case No. 73-2814 (03)

IN RE: THE ESTATE OF
SAMUEL DONNER,
Deceased.

BEATRICE R. DONNER,
Appellant,

vs.

PAUL B. ANTON, WILLIAM I. DONNER, RUTH JEAN DONNER, LARNA KATZ DONNER, EDWARD DAVID DONNER,
Appellees.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

NOTICE is hereby given that Beatrice Donner, the Appellant above-named, hereby appeals to the Supreme Court of the United States from the Order of the Supreme Court of Florida denying certiorari entered in this action on June 21, 1979.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

SINCLAIR, LOUIS, SIEGEL & HEATH
Attorneys for Appellant
1600 Alfred I. duPont Building
Miami, Florida 33131
(374-0544)

BY_____
PAUL SIEGEL

CERTIFICATE OF SERVICE

I, Paul Siegel, one of the attorneys for Beatrice R. Donner, Appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certifies that on the 12th day of September 1979, I served copies of the foregoing notice of appeal to the Supreme Court of the United States and on the several parties thereto as follows:

On, Paul B. Anton, William I. Donner, Ruth Jean Donner, Larna Katz Donner and Edward David Donner, Respondents, by mailing copies in duly addressed envelopes with first class postage prepaid to their respective attorneys of record, as follows:

HELLER & KAPLAN
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